Supreme Court, U.S.
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No. _____ OFFICE

In The

Supreme Court of the United States

October Term, 1997

JOHN WHITLEY, et al.,

Petitioners,

versus

RAYMOND ROCHON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED

1. For purposes of qualified immunity, was it clearly established in 1995 that under *Helling v. McKinney*, 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993), an inmate's exposure to ***any*** environmental tobacco smoke (ETS) violated his 8th Amendment right to be free from cruel and unusual punishment?

2. In the alternative, if this Court's upcoming decision in *Crawford-El v. Britton*[1] clarifies a civil rights plaintiff's procedural burden in a qualified immunity case, then this Court should grant the writ, vacate the Fifth Circuit's decision, and remand this case for reconsideration in light of that decision.

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[1] 93 F.3d 813 (D.C. Cir. 1996) (en banc), cert. granted, ___U.S.___, 117 S.Ct. 2451, 138 L.Ed.2d 210 (1997), argued 12/1/97.

PARTIES

The parties in this Court and the courts below are as follows:

Petitioners: John P. Whitley, Burl Cain, and Richard Stalder, who were defendants in the district court and appellees in the Court of Appeals.

The City of Angola, the State of Louisiana, and Edwin W. Edwards were defendants in the district court. They do not petition this Court.

Respondent: Raymond Rochon, who was the plaintiff in the district court and the appellant in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

The petitioners urge this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit which reversed the judgment of the United States District Court for the Middle District of Louisiana. The district court found that petitioners were entitled to qualified immunity and dismissed respondent's complaint pursuant to FRCP Rule 12(b)(6).

OPINIONS BELOW

The November 3, 1997 order of the United States Court of Appeals for the Fifth Circuit denying petitioners' timely petition for rehearing is unreported and is reprinted at Appendix B to this petition, p. App. 4. The September 24, 1997 opinion of the United States Court of Appeals for the Fifth Circuit is reported at 122 F.3d 319 (5th Cir. 1997) and is reprinted at Appendix A to this petition, p. App. 1. The district court's February 13, 1997 Amended Judgment dismissing respondent's suit is unreported and is reprinted at Appendix C to this petition, p. App. 5. The district court's February 13, 1997 Amended Opinion adopting the report of the magistrate judge (which granted the qualified immunity based motion to dismiss) is unreported and is reprinted at Appendix D to this petition, p. App. 6. The January 28, 1997 Judgment of the district court dismissing respondent's suit is unreported and is reprinted at Appendix E to this petition, p. App. 7. The January 28, 1997 Opinion adopting the report of the magistrate judge (which granted the qualified

immunity based motion but erroneously referred to it as a motion for summary judgment instead of a motion to dismiss) is unreported and is reprinted at Appendix F to this petition, p. App. 8. The December 4, 1996 report of the magistrate judge is unreported and is reprinted at Appendix G to this petition, p. App. 9.

JURISDICTION

On November 3, 1997 the United States Court of Appeals for the Fifth Circuit denied petitioners timely petition for rehearing of its opinion entered on September 24, 1997. This Court has jurisdiction under 28 USC Section 1254(1). The petitioners seek review of the denial by the Court of Appeals of their qualified immunity defense.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved.

United States Constitution

U.S. Constitution, Eighth Amendment (1791):

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Code

42 USC Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Respondent, Raymond Rochon, is a convicted felon sentenced to the custody of the Louisiana Department of Public Safety and Corrections (Department) and was, at all times relevant hereto, incarcerated at the Louisiana State Penitentiary at Angola, Louisiana (LSP). Respondent remains incarcerated at LSP.

On December 6, 1995 respondent filed a *pro se* complaint in the United States District Court for the Middle District of Louisiana asserting claims under the 8th

Amendment and 42 USC Section 1983 arising out of exposure to environmental tobacco smoke (ETS). The district court had original jurisdiction under 28 USC Section 1331 as respondent asserted a federal question. The only words in the complaint regarding tobacco smoke are that since respondent's confinement in the state penitentiary in 1981 he has been:

> forced and/or subjected to live in/and work in environments filled with tobacco smoke and thereby forced to second hand smoke.

He further alleged that if:

> the tobacco smoke conditions have not already caused plaintiff health problems they surely threaten to cause him health problems in the future and are currently violative of his state and federal rights.

On July 31, 1996 petitioners filed a motion to dismiss pursuant to FRCP Rule 12(b)(6) based on the qualified immunity defense. Petitioners asserted that at the time of the events complained of in 1995, an inmate had no clearly established constitutional right to live in a smoke-free prison. Respondent's complaint lacked factual specificity regarding his exposure to ETS as to time, place, or intensity.

On October 30, 1996 the district court ordered respondent to file a reply pleading within 15 days under FRCP Rule 7(a) and *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995) (en banc) to allege specific facts tailored to the petitioners' assertion of the qualified immunity defense. Respondent did not file a reply.

On December 4, 1996 the magistrate judge issued a report recommending that petitioners' qualified immunity based motion to dismiss be granted. Appendix G, p. App. 9. The report found that during the time of respondent's exposure to second-hand smoke, the law was not clear that prisons must be smoke-free and further found that respondent's reliance on *Helling*[2] for the proposition that prisoners may not be exposed to *any* second hand-smoke was misguided.

On January 28, 1997 the district judge issued an opinion adopting the magistrate judge's report of December 4, 1996 and granting petitioners' "motion for summary judgment"[3]. Appendix F to this petition, p. App. 8. On that same day judgment was entered accordingly. Appendix E to this petition, p. App. 7.

On February 13, 1997 the district judge issued an amended opinion adopting the magistrate judge's report of December 4, 1996 and granting petitioners' motion to dismiss. Appendix D to this petition, p. App. 6. On that same day an amended judgment was entered accordingly. Appendix C to this petition, p. App. 5.

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[2] *Helling v. McKinney*, 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993).

[3] Petitioners did not file a motion for summary judgment, instead they filed a motion to dismiss pursuant to FRCP Rule 12(b)(6). After the January 28, 1997 opinion was entered petitioners filed a motion to alter or amend judgment and opinion to reflect that their motion was one to dismiss, rather than one for summary judgment. That motion was granted by the district court and an amended opinion and amended judgment were entered.

On February 28, 1997 respondent filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit, appealing from the district court's February judgment. The Court of Appeals had jurisdiction to review the judgment pursuant to 28 USC Section 1291 and FRAP Rule 4.

On September 24, 1997 the Fifth Circuit issued a reported decision. *Rochon v. City of Angola, La.*, 122 F.3d 319 (5th Cir. 1997). Appendix A to this petition, p. App. 1. The Court of Appeals vacated the district court's judgment that granted petitioners' qualified immunity based motion to dismiss and remanded the case for further proceedings. *Rochon*, 122 F.3d at 320.

On October 8, 1997 petitioners filed a timely petition for rehearing to the United States Court of Appeals for the Fifth Circuit. On November 3, 1997 the Fifth Circuit denied the petition for rehearing. Appendix B of this petition, p. App. 4. This timely petition follows.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE WRIT TO CLARIFY THE CONTOURS OF AN INMATE'S 8TH AMENDMENT RIGHT TO BE FREE FROM EXPOSURE TO ENVIRONMENTAL TOBACCO SMOKE (ETS).

The decision of the Fifth Circuit in this case interprets *Helling v. McKinney*[4] to hold that ***any*** exposure to ETS in

[4] 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993).

prison violates the 8th Amendment's prohibition of cruel and unusual punishment. In order to defeat the qualified immunity defense, a plaintiff must plead facts with sufficient specificity for the court to determine whether the contours of a clearly established right were invaded. The Fifth Circuit's decision erroneously holds that an inmate's ETS complaint devoid of any factual specificity states a claim for violation of a right clearly established by *Helling*.

This petition involves an important question of federal law concerning the interrelationship between the protections of qualified immunity and the general standards of notice pleading under the Federal Rules of Civil Procedure. The Fifth Circuit's holding precludes any prison official who is a defendant in an ETS case from prevailing in a qualified immunity based motion to dismiss. Under that ruling, an inmate states an 8th Amendment claim under general notice pleading rules by merely alleging that "people in prison smoke around me." This eviscerates the protections of qualified immunity. The Fifth Circuit's decision affects not just this one isolated inmate case but instead affects all inmate ETS litigation. This ruling portends that ETS cases will become the inmate equivalent of asbestos litigation in this country. This Court should grant certiorari to define the contours of *Helling* so that inmate ETS cases do not overwhelm prison authorities and the federal court system.

A. The Fifth Circuit's ruling eliminates the qualified immunity defense in ETS cases.

The Fifth Circuit misinterpreted *Helling* to hold it was clearly established in 1995 that ***any*** exposure to ETS in prison constitutes cruel and unusual punishment. The Fifth Circuit's ruling eliminates the qualified immunity defense for prison officials in inmate ETS cases. If this were merely one isolated inmate case, it would not be worth this Court's time to grant this writ. However, this case involves an important issue of significant general importance to prison officials in the Fifth Circuit and those in the other circuits as well. There are thousands of inmates similarly situated in Louisiana and tens of thousands more across this country.

In a qualified immunity case, the contours of the right the official is alleged to have violated must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Anderson v. Creighton*, 483 U.S. 635, 639-40, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). Officials are not expected to determine the manner in which the law's gray areas might be clarified or defined. *Davis v. Scherer*, 468 U.S. 183, 195, 104 S.Ct. 3012, 3019-20, 83 L.Ed.2d 139 (1984).

The contours of an inmate's 8th Amendment right in an ETS case have not yet been determined by this Court. After *Helling* it is clearly established that 24 hour a day long-term confinement in a two-man cell with a 5 pack a day (and probably a 2, 3, or 4 pack a day) smoker violates an inmate's constitutional rights. *Helling* did not clearly establish in 1995 that *any* exposure to tobacco smoke in prison violates an inmate's constitutional rights. The

complaint in this case does not plead any specific facts regarding the nature, duration, or intensity of respondent's ETS exposure nor any facts from which it may be inferred that any petitioner had knowledge of the risk of harm to any inmate. Pursuant to FRCP Rule 7(a) the district court ordered respondent to file a reply alleging specific facts tailored to the petitioners' assertion of the qualified immunity defense. Respondent did not reply. The lack of factual specificity is fatal to respondent's burden of pleading his claim within the contours of the right clearly established by *Helling*.

Clearly, there is a continuum which extends from a smoke free prison at one extreme to long-term confinement in a cell with a 5 pack a day smoker at the other extreme. This Court has yet to define which point on that continuum separates unconstitutional exposure from constitutional exposure. The 8th Amendment embodies evolving contemporary standards of decency. *Rhodes v. Chapman*, 452 U.S. 337, 346-47, 101 S.Ct. 2392, 2399, 69 L.Ed.2d 59 (1981). However, "conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional." *Id*. Since community standards regarding exposure to ETS are presently a matter of great debate in this country, the qualified immunity defense is particularly appropriate in inmate ETS cases because it is ***not*** "clearly established" what level of ETS constitutes "unconstitutional exposure".

Although the evolving community standards seem to be leaning toward the future eventuality of laws restricting all smoking in public places, at present there is no such prohibition. Currently, society does not consider the

risk respondent complains of to be so grave that it violates contemporary standards of decency to expose someone unwillingly to that risk. While respondent may be "unwillingly" exposed to second hand smoke in his dormitory and workplace, he is not being exposed to a risk that society considers a violation of contemporary standards of decency. Although young children whose parents smoke may be "unwillingly" exposed to second hand tobacco smoke, it is not considered child abuse or a violation of state or federal law when parents smoke while their children are in the home or the family automobile.

B. Potential effects of the Fifth Circuit's ruling.

In the instant case respondent alleged that since his confinement in the state penitentiary in 1981 he has been "forced and/or subjected to live in/and work in environments filled with tobacco smoke and thereby forced to second hand smoke" and further alleged that if "the tobacco smoke conditions have not already caused plaintiff health problems they surely threaten to cause him health problems in the future and are currently violative of his state and federal rights." Under the Fifth Circuit's decision, the petitioners are effectively denied the use of the qualified immunity defense. Absent the protections of qualified immunity, petitioners must go back and determine for every day of the year preceding the filing date[5] the amount of ETS that the respondent was exposed to at

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[5] The prescriptive period for Section 1983 actions in Louisiana is one year. *Elzy v. Roberson*, 868 F.2d 793, 794 (5th Cir. 1989).

the state penitentiary. To make that determination, petitioners must factually develop such matters as:

- what buildings, rooms, etc., at the prison the inmate spent any time in during the previous year
- where he worked
- where he slept
- where he ate
- where he spent his leisure time
- where he received medical treatment
- where he met with any visitors or prison officials
- who was smoking in each location
- how much smoke was there
- the amount and type of ventilation in use in each location

In order to accurately determine this information, prison officials are faced with the possibility of having to monitor the air quality in each and every area of the prison on a minute to minute basis, of having to monitor the location of an inmate plaintiff for every minute and hour of each day to determine if he was exposed to ETS, and of having to employ experts to determine what levels of exposure to ETS are harmful. Gathering such information and employing experts will be extremely burdensome for prison officials and will greatly impact limited prison resources. These evils are exactly the burdens that the qualified immunity defense is intended to prevent.

This would be burden and problem enough if petitioners were talking about just this one case. Prison officials will have to perform the same monitoring activities and the same intense factual development each and every time an inmate files an ETS case pleading only "I got exposed to ETS." This burden creates a very serious problem which affects all inmate ETS litigation. Given the ease with which an inmate ETS claim can now be pleaded under the Fifth Circuit's ruling that such allegations state a violation of an inmate's "clearly established" constitutional rights, inmate ETS claims threaten to become the asbestos litigation of the new millennium.[6]

Additionally, considering inmates' proclivities for burdensome discovery requests, one would anticipate that an inmate ETS plaintiff would seek (1) canteen records of all inmates who purchased cigarettes within a given time period, (2) lists of inmates who smoked and who lived or who worked in his vicinity, (3) lists of employees who smoked and who worked in his vicinity, (4) how many cigarettes each inmate or employee smoked on each day, (5) where such smoking took place, etc., *ad nauseam*.

Under the *Helling* decision and the current state of the law it appears that most, if not all, inmate ETS cases will not be subject to resolution on either a motion to dismiss or a motion for summary judgment. Instead, they will have to be resolved at trial. Prison officials will be

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[6] If "I got exposed to ETS" states a claim upon which relief can be granted, the provisions of the Prison Litigation Reform Act amending 28 USC Section 1915(e)(2) and Section 1915A(b) become a paper tiger.

required to retain experts for each case but even medical science does not agree on the results or harm of exposure to ETS. Since there is a high level of scientific uncertainty regarding the dangers and effects of ETS, the issue of what level of ETS exposure is "unreasonable" creates a genuine issue of fact that does not lend itself to summary judgment. One can envision the "battle of the swearing experts" that will undoubtedly occur in trials of inmate ETS suits. Besides being overly fact intensive and expensive to litigate, inmate ETS cases will require significant investment of courts' time to review detailed factual material submitted at trial and/or in motions for summary judgment.

The only ETS case this court has decided[7] "clearly established" that it is cruel and unusual punishment to confine an inmate in a two-person cell with a 5 pack a day smoker. That level of exposure to ETS is at one end of the continuum and the level of exposure alleged by respondent, ***any*** tobacco smoke in prison, is at the other end. No one yet knows what level of inmate exposure to ETS crosses the line of a constitutional condition of confinement and becomes an unconstitutional one. In order for prison officials to have a "clearly established" legal standard to guide them, this Court should grant this writ to define and clarify the contours of the right and set guidelines for determining the boundary between constitutional and unconstitutional exposure on the ETS continuum.

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[7] *Helling v. McKinney, Id.*

Without further guidance and clarification from this Court, prison officials are effectively deprived of the benefits of the qualified immunity defense in inmate ETS cases and face an impending avalanche of inmate ETS suits.

II. IN THE ALTERNATIVE, IF THIS COURT'S UPCOMING DECISION IN *CRAWFORD-EL V. BRITTON* CLARIFIES A CIVIL RIGHTS PLAINTIFF'S PROCEDURAL BURDEN IN A QUALIFIED IMMUNITY CASE, THEN THIS COURT SHOULD GRANT THE WRIT, VACATE THE FIFTH CIRCUIT'S DECISION, AND REMAND THIS CASE FOR RECONSIDERATION IN LIGHT OF THAT DECISION.

On December 1, 1997 this Court heard arguments in *Crawford-El v. Britton*, 93 F.3d 813 (D.C. Cir. 1996) (en banc), cert. granted, ___U.S.___, 117 S.Ct. 2451, 138 L.Ed.2d 210 (1997), which concerns a civil rights plaintiff's procedural burdens when the defendants assert the qualified immunity defense. The district court in the instant case utilized the provisions of FRCP Rule 7(a) and the Fifth Circuit's decision in *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995) (en banc) to order the respondent to allege specific facts tailored to the assertion of the qualified immunity defense by petitioners. Respondent did not file any response to that order. Such specific pleading is necessary to effectuate the purposes of qualified immunity.

If this Court's upcoming decision in *Crawford-El* clarifies a civil rights plaintiff's procedural burden in a qualified immunity case, then this Court should grant the writ,

vacate the Fifth Circuit's decision, and remand this case for reconsideration in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Raymond ROCHON, Plaintiff-Appellant,

v.

CITY OF ANGOLA, LOUISIANA; State of Louisiana; John P. Whitley, Warden, Louisiana, State Penitentiary; Richard Stalder, Secretary; Edwin Edwards; Burl Cain, Warden, Louisiana State Penitentiary, Defendants-Appellees.

No. 97-30166
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Sept. 24, 1997.

Appeals from the United States District Court for the Middle District of Louisiana.

Before DUHÉ, DeMOSS and DENNIS, Circuit Judges.

PER CURIAM:

Raymond Rochon, Louisiana prisoner #93625, filed a civil rights complaint under 42 U.S.C. § 1983 against the City of Angola, Louisiana; the State of Louisiana; former Governor Edwin W. Edwards; Secretary of the Department of Corrections Richard Stalder; Warden Burl Cain; and Warden John P. Whitley. Rochon complained that since the beginning of his incarceration in 1981, he has been required to live and work "in environments filled with tobacco smoke." Rochon asserted that even if the tobacco smoke had not already harmed his health, the smoke posed a threat to his health in the future.

The district court granted the motion of defendants Whitley, Cain, and Stalder, based on qualified immunity,

to have Rochon's complaint dismissed pursuant to Fed. R.Civ.P. 12(b)(6) for failure to state a claim. A Rule 12(b)(6) dismissal will be affirmed only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *McCormack v. National Collegiate Athletic Ass'n*, 845 F.2d 1338, 1343 (5th Cir. 1988) (internal quotation and citation omitted).

This court conducts a bifurcated analysis to assess whether a defendant is entitled to qualified immunity. *Harper v. Harris County, Texas*, 21 F.3d 597, 600 (5th Cir.1994). The first step is to determine whether the plaintiff has alleged a violation of a clearly established constitutional right. This court uses "currently applicable constitutional standards to make this assessment." *Rankin v. Klevenhagen*, 5 F.3d 103, 106 (5th Cir. 1993). If the court finds no constitutional injury, it need not address the issue of qualified immunity. *Quives v. Campbell*, 934 F.2d 668, 671 (5th Cir.1991). The second step is to determine "whether the defendant's conduct was objectively reasonable." *Spann v. Rainey*, 987 F.2d 1110, 1114 (5th Cir.1993); *see also Harper*, 21 F.3d at 600. The reasonableness of the conduct must be assessed in light of the law as it existed at the time of the conduct in question. *Harper*, 21 F.3d at 601.

In *Helling v. McKinney*, 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993), the Supreme Court addressed the issue of exposure to environmental tobacco smoke (ETS) and held that the prisoner stated a cause of action under the Eighth Amendment by his allegation that prison officials were deliberately indifferent to his serious medical needs by exposing him to ETS which posed an unreasonable

risk to his health. *See Helling*, 509 U.S. at 35-36, 113 S.Ct. at 2481-82. With respect to the qualified-immunity analysis, the Supreme Court noted that determining whether conditions of confinement violate the Eighth Amendment "requires a court to assess whether society considers the risk that the prisoner complains of [ETS] to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *Helling*, 509 U.S. at 36, 113 S.Ct. at 2481. Rochon has alleged that he was forced to live and work in environments filled with tobacco smoke and that the prison smoking policies amounted to an unreasonable risk and deliberate indifference to his health. It is not beyond doubt that he can prove no set of facts establishing both of his allegations showing that this situation would not be within contemporary standards of decency. *Helling*, 509 U.S. at 36, 113 S.Ct. at 2481. Accordingly, the portion of the district court's judgment dismissing defendants Whitley, Cain, and Stalder under Rule 12(b)(6) is VACATED and REMANDED for appropriate proceedings. The remainder of the district court's judgment is AFFIRMED.

AFFIRM IN PART, VACATE AND REMAND IN PART.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-30166

RAYMOND ROCHON

Plaintiff - Appellant

v.

CITY OF ANGOLA, LOUISIANA; STATE OF LOUISIANA; JOHN P WHITLEY, Warden, Louisiana State Penitentiary; RICHARD STALDER, Secretary; EDWIN EDWARDS, BURL CAIN, Warden, Louisiana State Penitentiary

Defendants - Appellees

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

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ON PETITION FOR REHEARING

(Filed Nov. 03, 1997)

Before DUHÉ, DEMOSS, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ Harold L. DeMoss
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

RAYMOND ROCHON	CIVIL ACTION
VERSUS	NO. 95-1978-B-M1
CITY OF ANGOLA, ET AL	

AMENDED JUDGMENT

(Filed Feb. 14, 1997)

For the written reasons assigned:

IT IS ORDERED AND ADJUDGED that judgment shall be entered in favor of all defendants, except the City of Angola, Louisiana and former Gov. Edwin W. Edwards, and against the plaintiff dismissing this suit with prejudice.

IT IS FURTHER ORDERED AND ADJUDGED that the claims against the City of Angola, Louisiana and former Gov. Edwin W. Edwards be dismissed for failure to prosecute pursuant to Rule 4(m), Federal Rules of Civil Procedure.

Baton Rouge, Louisiana, Feb. 13, 1997.

/s/ Frank J. Polozola
FRANK J. POLOZOLA
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

RAYMOND ROCHON	CIVIL ACTION
VERSUS	NO. 95-1978-B-M1
CITY OF ANGOLA, ET AL	

AMENDED OPINION

(Filed Feb. 14, 1997)

After independently reviewing the entire record in this case and for reasons set forth in the Magistrate Judge's May 24, 1996 and December 4, 1996 Reports to which objections were filed:

IT IS ORDERED that the plaintiff's claims against the State of Louisiana be dismissed.

IT IS FURTHER ORDERED that the defendants' **Motion to Dismiss** be GRANTED and this suit be dismissed.

IT IS FURTHER ORDERED that the claims against the City of Angola, Louisiana and former Gov. Edwin W. Edwards be dismissed for failure to prosecute pursuant to Rule 4(m), Federal Rules of Civil Procedure. Judgment shall be entered accordingly.

Baton Rouge, Louisiana, Feb. 13, 1997.

/s/ Frank J. Polozola
FRANK J. POLOZOLA
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

RAYMOND ROCHON	CIVIL ACTION
VERSUS	NO. 95-1978-B-M1
CITY OF ANGOLA, ET AL	

JUDGMENT

(Filed Jan. 28, 1997)

For the written reasons assigned:

IT IS ORDERED AND ADJUDGED that judgment shall be entered in favor of all defendants, except the City of Angola, Louisiana and former Gov. Edwin W. Edwards, and against the plaintiff dismissing this suit with prejudice.

IT IS FURTHER ORDERED AND ADJUDGED that the claims against the City of Angola, Louisiana and former Gov. Edwin W. Edwards be dismissed for failure to prosecute pursuant to Rule 4(m), Federal Rules of Civil Procedure.

Baton Rouge, Louisiana, January 28, 1997.

/s/ Frank J. Polozola
FRANK J. POLOZOLA
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

RAYMOND ROCHON	CIVIL ACTION
VERSUS	NO. 95-1978-B-M1
CITY OF ANGOLA, ET AL	

OPINION

(Filed Jan. 28, 1997)

After independently reviewing the entire record in this case and for reasons set forth in the Magistrate Judge's May 24, 1996 and December 4, 1996 Reports to which objections were filed:

IT IS ORDERED that the plaintiff's claims against the State of Louisiana be dismissed.

IT IS FURTHER ORDERED that the defendants' motion for summary judgment be GRANTED and this suit be dismissed.

IT IS FURTHER ORDERED that the claims against the City of Angola, Louisiana and former Gov. Edwin W. Edwards be dismissed for failure to prosecute pursuant to Rule 4(m), Federal Rules of Civil Procedure. Judgment shall be entered accordingly.

Baton Rouge, Louisiana, January 28, 1997.

/s/ Frank J. Polozola
FRANK J. POLOZOLA
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

RAYMOND ROCHON — CIVIL ACTION

VERSUS

CITY OF ANGOLA, ET AL — NUMBER 95-1978-B-1

NOTICE

Please take notice that the attached Magistrate Judge's Report has been filed with the Clerk of the U. S. District Court.

In accordance with 28 U.S.C. §636(b)(1), you have ten days after being served with the attached report to file written objections to the proposed findings of fact, conclusions of law, and recommendations set forth therein. Failure to file written objections to the proposed findings, conclusions and recommendations within ten days after being served will bar you, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court.

ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO FILE WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.

Baton Rouge, Louisiana, December 4, 1996.

/s/ Stephen C. Riedlinger
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

RAYMOND ROCHON
VERSUS CIVIL ACTION
CITY OF ANGOLA, ET AL NUMBER 95-1978-B-1

MAGISTRATE JUDGE'S REPORT

(Filed December 5, 1996)

This matter is before the court on the defendants' motion to dismiss pursuant to Rule 12(b). Record document number 16. The motion is opposed. Record document number 18.

Pro se plaintiff, an inmate at Louisiana State Penitentiary, Angola, Louisiana, filed this action pursuant to 42 U.S.C. § 1983 against the City of Angola, Louisiana, the State of Louisiana, former warden John P. Whitley, Warden Burl Cain, Louisiana Department of Public Safety and Corrections Secretary Richard L. Stalder, and former Gov. Edwin W. Edwards.[1] Plaintiff alleged that he was subjected to unconstitutional conditions of confinement by exposure to environmental tobacco smoke.

Defendants[2] moved to dismiss the complaint pursuant to Rule 12(b) for failure to state a claim upon which relief can be granted.

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[1] A magistrate judge's report was submitted to the district judge recommending that the claims against the State of Louisiana be dismissed. Record document number 11.

[2] The City of Angola, Louisiana and former Gov. Edwin W. Edwards were not served with a summons and complaint and did not participate in the defendants' motion to dismiss.

On April 26, 1996, the President signed into law the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321, which amended: 18 U.S.C. §§ 3624(b), 3626; 42 U.S.C. § 1997e; 28 U.S.C. §§ 1915, 1346(b); and 11 U.S.C. § 523(a).

Subsection (c)(1) of 28 U.S.C. § 1997e was amended to provide the following:

> "(c) Dismissal. – (1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief."

The court must accept as true the plaintiff's allegations and may not dismiss the complaint for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of his claim which would entitle him to relief. *Boudeloche v. Grow Chemical Coatings Corp.*, 728 F. 2d 759 (5th Cir. 1984).

Plaintiff alleged that since his confinement to the state penitentiary in June, 1981, he has been "subjected to live in and/or work in environments filled with tobacco smoke and thereby forced to second hand smoke." Plaintiff further alleged that "[i]f the tobacco smoke conditions have not already caused plaintiff health problems – they surely threaten to cause him health problems in the future and are currently violative of his state and federal

rights." Plaintiff alleged that "the defendants and/or others either authorized, supervised, or condoned plaintiff's living and/or working conditions in question." Plaintiff brought this action against the defendants in their individual and official capacities seeking compensatory and punitive damages and prospective injunctive relief.

On October 30, 1996, the plaintiff was placed on notice that the court was considering granting the defendants' motion to dismiss. Plaintiff was ordered to file a reply pleading pursuant to Rule 7(a) within 15 days to allege specific facts tailored to the assertion of the qualified immunity defense by defendants Richard Stalder, Burl Cain and John P. Whitley. Plaintiff failed to file the response pleading as ordered.

It is well settled that in § 1983 cases, federal courts look to the most consonant statute of limitations of the forum state. *Owens v. Okure*, 488 U.S. 235, 109 S.Ct. 573 (1989); *Kitrell v. City of Rockwall*, 526 F.2d 715, 716 (5th Cir.). *cert. denied*, 426 U.S. 925, 96 S.Ct. 2636 (1976). For § 1983 cases brought in Louisiana federal courts, the appropriate statute of limitations is one year. Louisiana Civil Code article 3536; *Elzy v. Roberson*, 868 F.2d 793 (5th Cir. 1989); *Washington v. Breaux*, 782 F.2d 553 (5th Cir. 1986); *Kissinger v. Foti*, 544 F.2d 1257, 1258 (5th Cir. 1977). Plaintiff signed the complaint on November 30, 1995 and it was filed on December 6, 1995. Therefore, any claims plaintiff had against these defendants regarding acts which occurred prior to November 30, 1994 have prescribed.

Plaintiff alleged that his exposure to second-hand tobacco smoke violated his Eighth Amendment rights. The gist of the plaintiff's argument is that **any** exposure to tobacco smoke is violative of his constitutional rights.

The Eighth Amendment prohibits only the wanton and unnecessary infliction of pain. *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285 (1976). Whether the treatment received by an inmate is characterized as inhumane conditions of confinement, a failure to attend to medical needs, or a combination of both, it is appropriate to apply the "deliberate indifference" standard articulated in *Estelle. Wilson v. Seiter*, 501 U.S. 294, 111 S.Ct. 2321, 2327 (1991).[3]

Some conditions of confinement may establish an Eighth Amendment violation "in combination" when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need. Nothing so amorphous as "overall conditions" can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists. *Id.*

In order to state a claim under the Eighth Amendment, the plaintiff must allege that the defendants were deliberately indifferent to his serious medical needs through exposure to levels of environmental tobacco smoke (ETS) that caused harm or posed an unreasonable

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[3] In *Seiter*, the Supreme Court stated that, in emergency situations, where prison officials must act "in haste, [and] under pressure", the requisite intent rises to "acting 'maliciously and sadistically for the purpose of causing harm.' " *Seiter*, 501 U.S. 294, 111 S.Ct. at 2321.

risk of serious damage to his future health. *Helling v. McKinney*, ___ U.S. ___, 113 S.Ct. 2475 (1993).

A qualified immunity analysis requires the Court to first identify the specific right allegedly violated, determine whether at the time of the alleged violation the right was clearly established, and then inquire whether a reasonable person in the official's position would have known that his conduct would violate that right. *Mitchell v. Forsyth*, 472 U.S. 511, 535, 105 S.Ct. 2608 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982). A qualified immunity defense is available in an action alleging a statutory right was violated. *Harlow v. Fitzgerald*, 457 U.S. at 818, 102 S.Ct. at 2738.

During the time of the plaintiff's exposure to secondhand smoke, the law was not clear that the prisons must be smoke-free. Plaintiff's reliance on *Helling* for the proposition that prisoners may not be exposed to **any** secondhand tobacco smoke is simply misguided.

Because it is clear that the plaintiff's federal claim has no arguable basis in fact and in law, the allegations fail to state a claim, and the plaintiff seeks damages against a defendant who is immune, the complaint should be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(i), (ii) and (iii).[4]

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[4] Section 1915 of Title 28 was amended to add subsection (g) which provides the following: "(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous,

RECOMMENDATION

It is the recommendation of the magistrate judge that the defendants' motion to dismiss be granted and this action be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(i), (ii) and (iii). It is further recommended that the claims against the City of Angola, Louisiana and former Gov. Edwin W. Edwards be dismissed for failure to prosecute pursuant to Rule 4(m), Federal Rules of Civil Procedure.

Baton Rouge, Louisiana, December 4, 1996.

/s/ Steven C. Riedlinger
UNITED STATES
MAGISTRATE JUDGE

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malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury."